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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 4

LOCAL UNION NO. 5, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE-FITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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September 4, 1963

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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v.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Local Union No. 5, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on June 6, 1963.

OPINION BELOW

The Decision and Order of the National Labor Relations Board (J.A. 2)[1] including the Intermediate Report of the Trial Examiner (J.A. 22) is reported at 137 NLRB No. 100, 50 LRRM 1266. The opinion of the Court of Appeals is reproduced in Appendix A to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on June 6, 1963. This Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Does Section 8(b)(4)(i)(ii)(B) of the Labor Management Relation Act, 29 U.S.C. § 158(b) prohibit a union from inducing its members not to work on a job or from refusing to refer employees to an employer with whom it has a collective bargaining agreement, when, in either case, the employer is violating a valid primary job protection clause in the collective bargaining agreement.

2. Whether Section 8(b)(4)(B) and Section 8(b)(4)(D) of the Act are mutually exclusive and require, when a union is accused of violating both on the same set of facts, the jurisdictional question involved in the § 8(b)(4)(D) charge be resolved prior to the merits of the § 8(b)(4)(B) charge being determined.

[1] The record in the court below was printed in a Joint Appendix, cited herein as "J.A.," nine copies of which have been filed with this petition.

STATUTES INVOLVED

Sections 7, 8(b) (4) (i) (ii) (B), 8(b) (4) (i) (ii) (D), 8(e), and 13 of the Labor Management Relations Act, as amended, 29 U.S.C. §§ 157, 158(b), 158(e) and 163, hereinafter referred to as the Act.

The foregoing statutory provisions involved in this case are printed in Appendix B attached to this petition.

STATEMENT OF THE CASE

A. The Facts

Petitioner, Local 5 of Washington, D. C., has identical collective bargaining agreements with the Mechanical Contractors District of Columbia Association, Inc., and with several independent mechanical contractors in this area (J.A. 72, 121). These contractors perform plumbing and pipefitting work of every description, both inside and outside buildings in this area. The agreements contain a job protection clause—Section 32 of Article XVII (hereinafter referred to as Clause 32): (J.A. 125)

> "§ 32. It shall be a violation of this agreement for any contractor to contract for a job where plumbing work has been withheld from the plumbing contract by either the owner or general contractor for the purpose of being installed by other than journeymen plumbers and their apprentices. Plumbing work in this paragraph shall include the installation of all non-metallic sewers within the property line including both sanitary and storm as well as open drain tile."

Article VI and Section 6 of Article XV of the agreements provide that the contractor will install all piping in accordance with the work jurisdiction of the United Association and that plumbers will install all the pipe

in a plumbing system, including both the inside plumbing work and the outside sanitary sewers, water lines, and storm drains (J.A. 120).

In December 1959, Akron Mechanical Contractors, having previously operated non-union, asked to become a party to Petitioner's collective bargaining agreement so it could operate as a union contractor (J.A. 91, 96-98). This was done. Akron, at the same time, was apparently negotiating with the Venneri Company, a general contractor, to do some plumbing work at Andrews Air Force Base. He obtained a contract from Venneri for the inside plumbing and heating work on two hangars (the jobs here in dispute) but the contract did not include the installation of the outside pipe work (utilities). This violated Clause 32 of Akron's agreement with Petitioner. The outside pipe work was awarded to an excavating contractor, Nickles, for whom plumbers did not work. Akron was awarded other subcontracts from Venneri for work at Andrews, but on those jobs it contracted for both the inside and outside plumbing work.[2]

After learning that Akron had violated Clause 32 on the hangar jobs, Petitioner refused to refer any plumbers to those jobs and also told the plumbers on Akron's other jobs not to move or fabricate any pipe destined for the hangars. Petitioner also refused to

[2] Prior to the above jobs Venneri, in August of 1959, on the Library of Medicine job, subcontracted the outside pipe work to Nickles, and for this reason had difficulty in obtaining a union mechanical contractor to take only the inside plumbing work. Discussions were held with Petitioner and, since Venneri was new to this area, Petitioner waived Clause 32 for a mechanical contractor to take this job without violating the collective bargaining agreement (J.A. 69). (The amendments to § 8(b)(4) of the Act were adopted on September 14, 1959).

refer any plumbers to Nickles because he was not a Master Plumber (mechanical contractor) (J.A. 68). The policy of Local 5, as expressed in its collective bargaining agreement, was that, in the interest of public health and safety, only journeymen plumbers working for licensed Master Plumbers should install all pipe in a plumbing system (J.A. 124). Indeed, state statutes have, for obvious reasons, adopted the policy of Petitioner into law.[3]

Petitioner did not picket any jobs of Akron, Venneri, or Nickles, nor did it induce any employees of these employers (other than Akron's plumbers),[4] to strike. Petitioner never requested that Nickles, or his laborers, be removed from the job (J.A. 80, 108). Petitioner did not even interfere with the other craftsmen employed by Akron, such as operating engineers, sheet metal workers, etc., and initially Petitioner's members even worked for Akron on his jobs other than the hangar jobs. Petitioner in no way interfered with the replacements Akron hired to perform the plumbing work on the hangars. In other words, Petitioner limited its conduct to Akron and his plumbers.

Petitioner also submitted Akron's breach of Clause 32 to a joint management-labor conference board, as provided in its agreement (J.A. 115, 122), and this board found that Akron had violated the agreement in the manner alleged (J.A. 117). However, based upon the above described conduct, charges alleging violations of §8(b)(4)(i)(ii) (B) and (D) of the Act were filed against Local 5 by Venneri.

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[3] 43 Maryland Code Annotated, §§ 326, 329, 333, 334, 336 (1957 Ed.). See 1 D.C. Code § 725 and 2 D.C. Code § 1406 (1961 Ed.).

[4] Steamfitters of a sister local union were also requested not to do the plumbing or heating work on the hangar jobs.

B. The Decision of the Board

The Board, in a three to two decision, held that the Petitioner's inducement of its members not to move or fabricate pipe violated Section 8(b)(4)(i)(B) of the Act, and its refusal to refer plumbers to Akron violated Section 8(b)(4)(ii)(B) of the Act. Venneri, not Akron, was the primary employer, according to the Board majority, because he had the control over the assignment of the work, and Petitioner's object was to get the assignment of the outside utilities from Venneri. Akron was allegedly a neutral party.

Clause 32 was not expressly ruled upon by the Board. The Board attempted to distinguish Clause 32 from a typical subcontracting restriction or job protection clause, but finally decided that it need not consider Clause 32 because it had already found the Union's conduct to be illegal and, in that event, the clause could not be a defense to the charge, citing *Local 1976 Carpenters* v. *NLRB, (Sand Door)*, 357 U.S. 93.

Member Brown dissented (J.A. 14) finding that the inducement of Akron's employees and the refusal to refer by Petitioner resulted because Akron breached Clause 32, a valid job protection clause. The union therefore had a primary dispute with Akron. Venneri was just a neutral party, and his business relationships were not an object of Petitioner's conduct. Member Brown pointed out that the Board was giving undue significance to the element of control of assignments in determining the relationship of the parties.

Member Fanning also dissented but on a different basis (J.A. 10). He objected to deciding this case before the Board considered the pending proceeding under Section 10(k) of the Act which came about as a

result of a Section 8(b)(4)(i)(ii) (D) charge filed against Petitioner at the same time the Section 8(b)(4)(i)(ii)(B) charge was filed, and based on the identical facts. Member Fanning basically argued that Section 8(b)(4)(B) and Section 8(b)(4)(D) are mutually exclusive and the latter should be determined first in view of its unique purpose in the Act. He pointed out that since the majority had already enjoined Petitioner from striking, it would be meaningless to later hold in a Section 10(k) proceeding that Petitioner was entitled to the work for which it was striking. There is no basis in the statute for holding, as the majority did, that a union found entitled to work in a Section 10(k) proceeding could use primary conduct to obtain the work but not secondary action.

C. The Decision of the Court of Appeals

On review, the Court of Appeals for the District of Columbia Circuit affirmed the decision of the Board. The Court concluded that Venneri was the primary employer, based, as was the Board's decision, on the element of "control" of the work assignments. The Court relied upon *Local 636 U.A.* v. *NLRB*, 108 U.S. App. D.C. 24, 278 F. 2d 858 (1960) and *NLRB* v. *Enterprise Association*, 285 F. 2d 642 (2nd Cir. 1960), two cases involving secondary or hot cargo type clauses, not clauses directly benefiting the employees of the employer as in this case.

The court below conceded that Clause 32 was not the same as a hot cargo clause and that its purpose was different from a hot cargo clause. It also assumed that Clause 32 was a valid primary clause. Nevertheless, despite these assumptions and concessions, the court still found the case controlled by *Sand Door*,

supra, and that Clause 32 was really aimed at Venneri, not Akron. The court, with limited discussion, also found, as did the Board, that the refusal to refer in this case was restraint and coercion and that §§ 8(b)(4)(B) and 8(b)(4)(D) are not mutually exclusive.

REASONS FOR GRANTING WRIT

1. The lower court misconstrued and misapplied the decision of this Court in *Local 1976 Carpenters v. National Labor Relations Board (Sand Door)*, 357 U.S. 93.

The lower court, in considering Petitioner's argument that it was engaging in the admitted conduct to protest Akron's breach of Clause 32, assumed that Clause 32 was a valid job protection clause, not proscribed by Section 8(e) of the Act, or included within the construction industry proviso to Section 8(e) (*infra*, App. B, p. 13a); ergo, it was a valid primary subcontracting restriction or job protection clause. The court then proceeded to find that, while this may be true, Petitioner could not take the action it did to protest the violation of Section 32 because of this Court's holding in *Sand Door*, *supra*. The lower court reasoned that Clause 32 was not a hot cargo clause but that *Sand Door* was not limited to only hot cargo or secondary type clauses. In other words, in the opinion of the lower court, *Sand Door* held strikes to protest the breach of valid subcontracting clauses (not covered by Section 8(e) of the Act) to be violative of Section 8(b)(4) of the Act.

Sand Door, in this Petitioner's opinion, was very definitely limited to hot cargo (hot goods) or secondary type clauses and, in fact, the expressed purpose of

Section 8(e) of the Act, adopted in 1959, was to declare void the type of clause involved in *Sand Door* and similar hot cargo clauses.[5] However, Congress did not intend to outlaw traditional subcontracting clauses by Section 8(e), despite the literal language of the section,[6] and the construction industry proviso only exempts from Section 8(e) the type of clause which would, but for the proviso, be included in Section 8(e). To this latter group, then, *Sand Door* would probably apply,[7] but if the lower court assumed, as we submit is true, that Clause 32 was not covered by either Section 8(e) or the construction proviso, then *Sand Door* would not be applicable.

The lower court also misapplied the holding in *Sand Door* to this case. *Sand Door* held that a hot cargo clause may not legalize conduct which would otherwise be illegal under Section 8(b)(4). This Court, in *Sand Door*, did not consider the question of whether there was a violation of Section 8(b)(4) of the Act, that is, illegal conduct and a proscribed object, and expressly declined to review the Board and lower court's rulings on this issue which were against the Petitioners. 357 U.S. at 96 n. 1. The only question before the Court

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[5] See 105 Cong. Rec. 14195 (Daily Ed. Aug. 11, 1959) (Remarks of Representative Griffin: "Our substitute would ban all hot-cargo agreements.") and H. Conf. Rep. No. 1147 on S. 1555, 86th Cong., 1st Sess. 40 (1959).

[6] *Sunrise Transportation*, 137 NLRB No. 98; *Minnesota Milk Co.*, 133 NLRB 1341; and *Cox, Landrum-Griffin Amendments to NLRA*, 44 Minn. L.R. 257, 273. Such clauses are mandatory subjects of bargaining and may be enforced by strike action. *See Timken Roller Bearing Co.*, 70 NLRB 500, *rev'd on other grounds*, 161 F. 2d 949 (6th Cir.; 1947)

[7] See 105 Cong. Rec. 16415 (Daily Ed. Sept. 3, 1959) (Senator Kennedy).

was whether the hot cargo clauses excused conduct which otherwise "would unquestionably be a violation" of Section 8(b)(4). 357 U.S. at 101.

Petitioner herein did not argue that Clause 32 was a defense for otherwise illegal conduct, and the lower court recognized this (App. A, p. 5a). But rather than answer this contention, the court recast Petitioner's argument into the mold of *Sand Door* and then applied the *Sand Door* rationale. Petitioner's position, both before the Board and the lower court, was that Section 32 was a valid subcontracting or job protection clause and, in determining what was the object of Petitioner, Clause 32 must be considered as evidence of its object, not a possible defense after a violation of the Act has been found. This distinction is important, and unless this Court amplifies its holding in *Sand Door*, it is quite obvious that all valid subcontracting clauses will be brushed aside when a charge of violation of Section 8(b)(4) is made and the case determined without a consideration of probably the most important evidence to support a Union's contention of primary action.

2. The lower court failed to properly apply the decision of this Court in *Local 761 IUE* v. *NLRB*, 366 U.S. 667.

In *Local 761 supra*, this Court recognized that it is difficult in many secondary boycott cases to determine whether union conduct has an effect of inducing secondary parties to take certain action and conduct which has as an object the inducing of the secondary parties to take the same action. Only in the latter situation is the activity of the union proscribed by Section 8(b)(4)(B). *Retail Clerks, Local 770* v. *NLRB*, 111 U.S. App. D.C. 246, 296 F. 2d 368 (1961), and *Seafarers Interna-*

tional Union v. *NLRB*, 105 U.S. App. D.C. 211, 265 F. 2d 585 (1959). The problem is not susceptible to quick definitive formulas, and therefore, this Court approved the "means" test, as applied by some lower courts, i.e., the court must look to the means employed by a union to promote its cause in determining the object. In the subject case, the court ignored this legal "means" test and this caused the court to err in differentiating between the object and effect of Petitioner's conduct. The Petitioner did not picket Akron, or any other employer on the job; it did not interfere with other employees of Akron, or other employees on the job, such as operating engineers sheetmetal workers and laborers; it did not request the removal of Nickles or his laborers from the job; never approached Nickles, and it did not interfere with the replacement plumbers hired by Akron from other sources. The lower court found, as a matter of law, that these facts were unimportant and "beside the point" (See App. A, p. 7a). This ruling, Petitioner submits, is contrary to the holding of this Court in *Local 761, IUE, supra.* A consideration of these factors by the Board and the Court on review was essential to determine the object of Petitioner's conduct.

An important element in this case is the extensive reliance on the theory of "control of work assignments" by the court below and the Board in determining that Venneri, not Akron, was the primary employer. Of course, with this theory a determination of who has control over the work in a situation such as this is tantamount to a finding of a violation of Section 8(b)(4). There is nothing in the statute which gives this factor more significance than any other in determining whether a violation has been committed, and its use, to the exclusion of other

factors is inconsistent with this Court's holding in *Local 761, supra.* Basically, the theory is that if the employer, against whom action is taken, does not have the ability to satisfy what the Board determines to be the demands of the union, but some other employer on the job has this ability, then the latter is the primary, and activity directed at the former is secondary and prohibitive. The District of Columbia Circuit adopted the theory in *Local 636* v. *NLRB, supra,* and that decision was approved by the Second Circuit in *NLRB* v. *Enterprise Association, supra.* Later, the District of Columbia Circuit rejected the control theory in *Retail Clerks, Local 770* v. *NLRB, supra,* a case which the lower court here attempted to distinguish on the facts. A majority of the Board has vacillated on the theory, relying upon it in the instant case and others[8] but also ignoring it.[9]

There has been sharp disagreement among the Board Members as to the validity of the control theory. Member Brown, in dissenting from the view of the majority of the Board, has consistently taken the position that " 'the majority ignores the basic nature of the dispute and makes an incidental factor . . . the extent to which an employer could satisfy the union's demands . . . the determinative consideration.' The majority thus disregards the obvious fact that in a lawful primary strike, employers may not be willing or at times even able to satisfy their employees' lawful demands." *Cardinal Industries, Inc., supra,* at p. 5 (slip opinion).

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[8] *Cardinal Industries*, 144 NLRB No. 16 (Aug. 23, 1963); *Wiggins Terminals, Inc.*, 137 NLRB No. 3, and *Board of Harbor Commissioners*, 137 NLRB 1178.

[9] See *Syracuse Supply*, 139 NLRB No. 50, in which *Retail Clerks Union, Local 770* v. *NLRB, supra,* was cited as support.

The importance of the approach of the Board and court below on this issue (not to mention the obvious confusion caused by the apparent inconsistent decisions on the same issue) is manifest. The construction industry generally operates through the use of subcontractors, roughly divided by the type of craft or the work they perform. Their work is intermittent, the jobs of short duration and different types.[10] If the approach adopted here is to be the law, general contractors, as a favored class, are given carte blanche to destroy all traditional concepts of craft jurisdiction. Unions will have to refer men to subcontractors no matter how much work the general contractor awards to the subcontractor, or how much work the subcontractor accepts. A union's craft jurisdiction and its job protection clauses will be meaningless. The breadth of this holding, in its effect on traditional means of conducting labor management relations in a large segment of our economy, makes review by this Court appropriate.[11]

The importance of the issue here is even further heightened by the amendment to the Act in 1959 which

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[10] See 84 Monthly Labor Review 715 (Part II). Because of the distinct character of the construction industry the typical subcontracting restrictions are ineffective because they may be circumvented by the general contractor withholding work from the subcontractor. Under the typical clause, if the subcontractor doesn't have certain work, the employees can't claim it. For a discussion of typical subcontracting restrictions, see St. Antoine, *Secondary Boycotts and Hot Cargo: A Study in Balance of Power*, 40 Det. L.R. 189, 207.

[11] Clauses such as Clause 32 are common throughout the building industry. See, for example, *Cardinal Industries, Inc., supra*; *Carleton Bros.*, 137 NLRB No. 80; and *Binnings Construction*, 138 NLRB No. 116.

added subsection (ii) to Section 8(b)(4),[12] and the holding of the lower court that the refusal to refer here was restraint and coercion, although the facts did not so demonstrate "as clearly as one might wish." (See App. A, p. 8a), 53 LRRM 2424, 2427. The Board went even further and found a refusal to refer to be per se restraint and coercion.[13] These holdings assure a contractor that even though he breaks the job protection clause of his collective bargaining agreement, the union must still remain his source of skilled journeymen. This result is harsh indeed, and the issue is one only this Court can decide and should decide so that all parties to collective bargaining agreements will be cognizant of their rights and obligations.

3. The question presented here is the same question presented in *Steelworkers Local 5895* v. *NLRB*, No. 89 (1963 Term, Certiorari granted May 13, 1963) only in different context.

Both cases involve the distinction between the object of union conduct and merely the effect of that conduct as it relates to Section 8(b)(4) of the Act. In *Steelworkers, supra*, the lower court based its decision primarily upon the ownership of the property upon which the picketing was conducted, *NLRB* v. *Steel-*

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[12] "It shall be an unfair labor practice for a labor organization or its agents . . . (ii) to threaten, coerce, or restrain any person . . . where . . . an object thereof is . . ."

[13] *Arthur Venneri Co.*, 137 NLRB No. 100, (J.A. 2). See *NLRB* v. *Local 825 Operating Engineers*, —— F. 2d ——, 52 LRRM 2757 (3rd Cir., 1963). Neither the lower court nor the Board considered the meaning of the words "restraint" and "coercion" used in another section of the Act, and defined by this Court in *NLRB* v. *Drivers Local 639*, 362 U.S. 274 (peaceful minority union picketing was not restraint and coercion under Section 8(b)(1)(A) of the Act).

workers Local 3895, 311 F. 2d 135 (2nd Cir., 1962), and, in the instant case the decision rested in part on which employer had control of the work assignments. The issues are related in that they both involve the basic application of the rules of law developed under Section 8(b)(4). It is respectfully suggested that many of the problems still surrounding this section of the Act, after 15 years of litigation, could appropriately be disposed of by a consideration of these two cases.[14]

4. The second question presented, i.e., § 8(b)(4)(B) and § 8(b)(4)(D), are mutually exclusive and the jurisdictional issue involved in the latter should be decided before the § 8(b)(4)(B) charge is considered—involves an important aspect of statutory construction which this Court will ultimately have to decide.

This issue caused a sharp disagreement among the Board members in the instant case[15] and it is difficult to see how further litigation on the matter, without guidance from this Court, will be of assistance to unions and employers. Section 8(b)(4)(D) and Section 10(k) have belatedly acquired equal status with their sister sections of the Act since *IBEW Local 1212 v. NLRB (CBS)*, 364 U.S. 573. Prior to *CBS, supra*, these sections, as interpreted by the Board, were, for all practical purposes, ineffectual. In *CBS, supra*, this Court directed the Board to make affirmative work assignments in Section 10(k) proceedings when a charge is filed under Section 8(b)(4)(D) of the

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[14] The Court has also granted certiorari in two other cases involving different aspects of § 8(b)(4)(B), *NLRB v. Fruit and Vegetable Packers*, No. 88, and *NLRB v. Servette*, No. 111.

[15] See *Arthur Venneri Co.*, 137 NLRB No. 100, (J.A. 10) (dissenting opinion, Fanning), and *Board of Harbor Commissioners*, 137 NLRB No. 117.

Act. Since these provisions of the Act, both unique, have acquired great significance since *CBS, supra*, the difficulty of enforcing them consistently with other provisions of the Act, has become obvious.

The Board and the lower court found that Section 8(b)(4)(D) prohibits both primary and secondary activity in support of a jurisdictional claim but that the converse is not true, only primary activity is permitted in support of such claim. Member Fanning pointed out that nothing in the statute supports this reasoning. He suggests a method of harmoniously interpreting the two subsections of Section 8(b)(4) consistent with the congressional intent of favoring voluntary adjustments of jurisdictional disputes. Certainly unions, particularly in the construction industry, which must litigate their claims to jurisdiction in long and expensive Section 10(k) proceedings, as now applied,[16] are entitled to know that if they prevail they will be allowed to strike their employer. In the present context of the law, it is an empty victory indeed for a charged union to be awarded certain work in a Section 10(k) proceeding many months after the Board, in a Section 8(b)(4)(B) proceeding, enjoined the union from striking for the same work.

Problems inherent in Section 8(b)(4)(D) and Section 10(k), but latent until *CBS*, now must be answered. There are many, but further litigation, without some guidance from this Court, will not precipitate solutions.

5. The lower courts have great difficulty in interpreting, with clarity, the so-called secondary boycott

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[16] The record in the § 10(k) proceeding in the instant case consists of approximately 9,000 pages of testimony and over two hundred exhibits. It is now pending before the Board.

section of the Act. This Court has considered the issues involved in Section 8(b)(4) on several occasions but, from the discussion above, it is obvious that further refinement is necessary.

The instant case involves a common situation in the construction industry[17] where, it will be admitted, Section 8(b)(4) has its most devastating effect. Petitioner suggests, therefore, that this case is an appropriate vehicle for this Court to consider the problems raised in this petition.

CONCLUSION

For the reasons stated, this petition for certiorari should be granted.

Respectfully submitted,

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[17] In 1962, $61,000,000,000 was spent in the United States on new construction (11% of the gross national product). On an average, 2.7 million workers were employed monthly on this work. (Repair and maintenance work not included.) 9 Const. Review #2 (Feb. 1963, Dept. of Commerce), and "The Constructor," (Jan. 1963, Associated General Contractors).